APPLICANT NO._____

ARKANSAS STATE BAR EXAMINATION

FEBRUARY, 2009

Property

1 page

The State of Arkansas conveyed 40 acres to Fred Jones, Sr., but it reserved all oil, gas, and mineral rights in the deed. Fred's wife had died several years earlier. No subsequent deeds on the 40 acres referred to the State's reservation of rights.

Fred Jones, Sr. later deeded his 40 acres with his newly built house on it to his son, Fred Jones, Jr. Six months later Fred, Jr. married Sue. After being married for about a year Sue convinced Fred, Jr. to put her name on the deed to the property with his. Shortly thereafter, she left Fred, Jr. and went to Missouri with another man. Fred, Jr. sued her for divorce and Sue failed to respond. A valid default divorce decree is entered in Arkansas against Sue.

Two years later, Fred, Jr. married Peggy. After two years of marriage, Peggy convinced Fred, Jr. to add her name on the deed to the property. Six months later, Peggy had warranty deeds drawn up for two 10 acre sections of the 40 acres and she, by her signature only on the deeds, conveyed a 10-acre tract to each of her illegitimate twin sons, Brody and Cody. Brody decided to move on to his 10-acre tract. He purchased a mobile home through Greentree Acceptance Corporation and gave it a security interest in his 10 acres to buy the mobile home. Brody moved the mobile home on to his 10-acre tract, fenced it off, mowed it and lived on the property for 10 years. Cody moved to Florida.

Fred, Jr. was later killed in a plane crash. In his will he named his brother Earl Jones to be the executor of his estate. Promptly, Earl attempted to liquidate the property.

Question:

Please address what interest, if any, Sue, Peggy, the estate of Fred, Jr., Brody, Greentree, Cody, and the State of Arkansas may have in the property.

Sue: It is possible that Sue still has some interest in the Forty (40) acres that she lived on with Fred. The question is whether there is such thing as a Valid Default Divorce Decree in Arkansas. According to the Arkansas Code Annotated there is no such action that can be taken in Arkansas. I will assume for the purposes of this question that the inclusion of the "valid default divorce decree" insures that this issue is not what is being tested over.

The interest that Sue intially held was a **tenancy by the entirety** with Fred Jones Jr. A tenancy by the entirety is a form of joint property ownership reserved for a Husband and Wife and is still currently recognized in Arkansas. It is presumed that a husband and wife whose name appears jointly on a title for property hold the property as Tenants by the entirety. Tenants by the entirety own the land by the whole and not by the part. There is not right to partition. A Tenancy by the Entirety requires 5 unities, Time- take their interest at the same time, Title-from the same title, Interest-they hold the same interest, Possession-they each have a right to possession of the entire property, and Person-they are unified in person, i.e., husband and wife. The time and title issues here are not a problem because Arkansas allows a conveyance in this manner without a strawman. When Fred Jones Jr. put Sue's name on the deed, the property became theirs as Tenants by the Entirety. If Fred Jones Jr. and Sue became divorced, they became equal **Tenants in Common** to the forty (40) acres of land because marital property is generally divided equally between the parties. Tenants in Common have a right to possess the whole land but also have a right to partition the property.

Sue most likely still owns a Fifty (50) percent interest as a Tenant in Common with the additional owners of the 40 Acres.

Peggy:Peggy owns as **Tenants in Common**, *supra* with Sue a 50 (fifty) percent interest in the forty (40) acres. After Peggy married Fred Jones Jr., and he placed her name on the deed to the forty (40) acres, they became **Tenants by the Entirety,** *supra*, to a Fifty (50) percent interest in the forty acres with Sue holding the other fifty (50) percent interest as a Tenant in Common with Fred and Peggy. Peggy's attempted transfer of the two (2) ten (10) acre tracts to her children was invalid because only her name was on the Deed. Because at that time her interest was that of a Tenant by the Entirety, she needed the signature of Fred Jones Jr. in order to effectively convey the acreage to her children. A tenant by the entirety is not able to effectively sell any part of their ownership interest without the other tenant by the entirety participating in the conveyance. Here, Fred Jones Jr. did not, so the acres are not owned by Brody and Cody. When Fred Jones Jr. died, his interest in the property **automatically** be that of Peggy's because one of the features of a **tenancy by the entirety is a RIGHT OF SURVIVORSHIP.** Fred Jones Jr.'s death made his widow and his ex-wife tenants in common to the forty (40) acres.

Estate of Fred Jones Jr. The Estate of Fred Jones Jr. has **no** interest in the forty (40) acres. Fred Jones Jr. lost half of the rights to the property in his divorce from Sue and upon his death his interest in the other half of the property will not enter probate because of **Peggy's right of survivorship** which will convert his interest completely to Peggy.

Brody and Cody Brody and Cody have no interest in the ten (10) acre tracts allegedly conveyed to them. The Deed conveyed to Brody and Cody as individuals were ineffective because Peggy could not partition her interest in the forty (40) acres because she owned it as a **tenant by the entirety** with her husband Fred Jones Jr. and because his name was not on the

deeds, they were ineffective. They could argue **after acquired title, or estoppel by deed**, but I do not believe that will help them in this situation. Those two (2) doctrines are used normally for situations where prospective heirs sell their as yet acquired interest in property and upon receiving their interest it is automatically transferred to the 3rd party. I do not believe the doctrine will be effective in this situation because of the uniqueness of a tenancy by the entirety.

Greentree: Greentree has no interest in the ten (10) acres it believes it has a mortgage on which it erroneously believed belonged to Brody. Brody had no interest in the property and was therefore unable to grant a security interest in the property to Greentree. Greentree will still be able to recover the money it loaned to Brody, it will just have to enforce the interest as personal against him and not against the land it believed he owned.

State of Arkansas: The State of Arkansas still retains its rights to the oil, gas, and mineral rights it originally reserved in the deed to Fred Jones Sr. The issue is whether the reservation of rights was intended to **run with the land**. A reserved easement or profit is good against successors in title if it **touches and concerns** the land and was **intended to run with the land**, and whether **horizontal privity** existed between the original parties. Here the reservation was for oil, gas, and mineral rights from the forty (40) acres. This clearly touches and concerns the land. The State of Arkansas would gain no beneficial use from the reservation if it ended in a short term, so most likely the State intended for the burden of it taking mineral, gas, and oil rights to run, and because The State of Arkanas conveyed the land to Fred Jones Jr., there was Horizontal privity. The State of Arkansas still maintains its oil, gas, and mineral rights.

END OF EXAM

APPLICANT NO._____

ARKANSAS BAR EXAMINATION

FEBRUARY, 2009

Criminal Law

2 pages

Humpty and Jill arrived at a residence which Jill shared with Jack. Jack confronted them. An argument ensued, and Jack struck Humpty in the head with a pail, cracking Humpty's skull. Humpty died instantly because his head was as thin as an eggshell. Jack then fled the scene in his vehicle. Jack's flight escalated into a police chase. The chase ended when a patrol car was hit by Jack's car. Jack ran from his car and was apprehended in the woods after he fell down a hill.

After the pursuit on foot, Sheriff Mick E. Mouse took Jack into custody and read Jack his *Miranda* rights from a pre-printed card. Jack indicated that he understood his rights. Sheriff Mouse then asked, "Why are you running from the police?" Jack responded, "I don't want to say anything right now." Sheriff Mouse then walked Jack back up the hill. When they got to the top of the hill, Sheriff Mouse asked Jack why he would "kill somebody over a woman." Jack replied that "this goes back a lot further than what you understand." Sheriff Mouse then conducted a pat down search of Jack. He found a loaded 9 mm gun in Jack's waistband. Sheriff Mouse secured the firearm and then turned Jack over to a couple of deputies. Sheriff Mouse then conducted a search of Jack's car. Sheriff Mouse opened the trunk of Jack's car and found a bloody pail.

The officers put Jack in the passenger seat of a patrol vehicle at the scene of Jack's arrest. Deputy Don O. Duck confirmed with Jack that he had been given his *Miranda* rights and that he understood those rights. According to Deputy Duck's testimony, he approached Jack and said, "I need to talk to you about what happened. Okay? Do you understand your rights as the Sheriff advised you earlier?" Jack replied "Yes. I would like an attorney but I can't think of her name." Deputy Duck then asked, "Do you want to go to jail or do you want to talk?" Jack replied, "Alright." Deputy Duck then taped Jack's statement while the two individuals sat in the patrol vehicle at the scene. In the statement, Jack admitted striking Humpty because he was upset with Jill.

Prosecutor W.E. "Willie" Winkie files a felony information charging Jack with first degree murder and felon in possession of a firearm. As a part of the felony information, Prosecutor Winkie also alleges that Jack's sentence should be enhanced under the habitual offender statute since Jack has been convicted of two prior felony offenses. Jack retains Attorney Muffet. Miss Muffet doesn't want to go trial on these two counts at the same time.

Question 1:

Short of getting one of these counts dismissed before trial, are there any procedural options available to Miss Muffet to avoid having Jack tried on these counts at the same time?

Question 2:

Attorney Muffet moves to suppress the bloody pail. How should the Court rule on this motion?

Question 3:

During a suppression hearing, Deputy Duck testified that after the tape was started, Jack never requested an attorney and never attempted to end the conversation. Despite this testimony, Miss Muffet moves to suppress this statement. How should the Court rule on Miss Muffet's motion to suppress the taped statement?

CRIMINAL LAW - BEST ANSWER
5 pages

Question 1.

Muffet can move for severance. Typically severance involves one of three situations. The first situation is were a defendant is tried on two seperate acts because he or she went on a crime spree. The second situation is where the defendant is being tried on two seperate offenses because they are part of the same plan or scheme. The last incident is were the defendent is tried on two seperate crimes becasue the crimes are similar. The third situation is the only situation where severance is automatic. The other two situations are the one involved in this case it appears we have situation two because the felon in possession of a fire arm appears to be linked to Jacks plan or scheme because he did not have time to pick up the gun as he fled from the scene fo the crime.

Severance under this scenerio is within the trial judges discretion. Ms. Muffet may argue that Jack will suffer extreme prejudice because the jury may consider the fact that he possessed a gun and the fact that he was previously convicted of two prior felonies. She may attempt to argue the case of US v. Old Chief. In US v. Old Chief, the defendant had previously be convicted of battery using a weapon. In his trial, he was charged with felon in possesion of a hand gun and the same weapons charge that he was convicted of previously. The United States Supreme Court determined that the trial court should have either (a) allowed the defendant to stipulate that he is a convicted felon or (b) sever the two causes of action and try them seperately. This case is simlar to Old Chief. Thus, eventhough the standard of review for the trial judge will be abuse of discretion. The judge will probably sever the counts to avoid being overturned of appeal.

The state will argue that the defendant will not be prejudiced because these two felonies are not like those in old chief because they are different (I assume this because if Jack had previously commited murder he would probably still be in Jail because first degree murder is a class y felony). The state will also say that these two crimes are closely related in time and are part of one transaction. Therefore, the jury should be allowed to have one continuous story.

Most likely, if the previous felonies are similar to the charge of first degree murder, the trial judge will sever the two counts and try them seperately.

Question 2

The Fourth amendment to the constitution protects against unreasonable warrantless searches and seizures. If a search was in violation of the 4th amendment, then all evidence obtained because of the violation will be suppresed as fruit of the poisonous tree. Before one can invoke the fourth amendmen he or she must have a privacy interest in the places to be searched and the things to be seized. *Rakas*. The fact pattern states that "Jack then fled to **his** vehicle." This is the same vehicle that Sheriff Mouse searched; thus, Jack had a privacy interest. Next, we must determine if any of the warrrantless search exception apply to these facts becaus the police did not obtain a warrant before they searched Jack's car.

The first exception that might apply is the search incident to arrest doctrine. Under this exception, the police may search the wingspan of an individual who they have probable cause to arrest. Furthermore, under this doctrine, the United States Supreme Court has also stated that an arresting officer may search the entire inside of the car including the console and the unlocked glove box. The Supreme Court, however, has stated that officers may not search a

car's truck during a search incident to arrest because this is not a location that the defendant may get to in order to harm the officers. Furthermore, in our situation, this doctrine would probably not apply because Jack was restrained in the police cruiser when Sherrif Mouse found the bloody pail.

The next exception to the warrant requirement. Is the automobile exception. Under this doctrine, a police officer who has probable cause to believe that a particular car contains instrumentalities of a crime may search the care for the instrumentalities or contraband. Assuming Jill called the cops, and this is the reason for the "police chase." Then, Sheriff Mouse would have had probable cause to stop Jack and to search his car for the instrumentality involved in Humpty's death: the bloddy pale.

If the cops began the chase for other reasons, then possible this search falls under the emergency exception to the warrant requirement. Under this exception, the police when in hot pursuit of a fleeing suspect may search anywhere they apprehend the suspect for the evidence of the crime because of the exigency. This rule only applies if the officers did not create the exigency. The fact are not clear whether or not Jack was speeding when the cops started pursuing him. This pursut eventually led to Jack hitting a police car and fleeing. Muffet will obviously argue that Jack fleed from his car and therefore the scene of the exegency was no longer the car but instead it was the woods. Furthermore, Jack and Muffet will argue that Jack was in custody when Mouse searched the car. Therefore, the exigency does not apply.

Even if none of the above exceptions to the warrant requirement apply, the Prosecutor may argue one of the exceptions to a fourth amendment violation. The prosecutor may argue that the bloody pail would have been **inevitably discovered**. Under this exception, the evidence found in violationn of the fourth amendment will not be exculded if the prosecutor can show that the evidence would have been inevitably discovered. In this situation, the prosecutory may argue that the evidence would have been discovered under a valid **inventory**

search. After an arrest, Police are allowed to conduct an inventory search of the arrested persons clothing and automobiles (if the person does not have someone that can drive the car home). In this case, the officer arrested Jack. Thus, they would have found the bloody pale when they inventoried the car. Note, for an inventory to be upheld the police department must have organized procedure for conducting an inventory search and the police must abide by those procedure.

In conclusion, the pail will probably come into evidence under one of the warrant exception or one of the exceptions to the exclusionary rule.

Question 3.

Under Miranda v. Arizona, a court must exclude evidene taken in violation of one Miranda Rights. The United States Supreme Court based Miranda Upon the 5th amendment right against self inrimination. Under this right, a police officer before attempting custodial (don't feel free to leave) interogation (and line of conversation that could lead to inclupatory evidence), must give the following statement: you have the right to remain silent, anything you say or do can be used against you in a court of law. You have the right to an attorney if you cannot afford one, one will be provided for you.

Under Miranda, if a defendant states or indicates that he wishes to remain silent, the police must scrupolously honor this request. However, the officer's may later reinitiate questioning if another Mirdanda warning is issued. Also under Miranda, if the defendant invokes his right to counsel, then, the police must end all questioning immediately regarding that particular crime until the defendant's attorney is present. Both of these rights may be waived if the defendant give what is known as a zerbst waiver, i.e., the waiver must be knowing, intelligent, and voluntary.

In this case, Sheriff Mouse first initiated the custodial interogation. He read Jack the Miranda rights and Jacks said he did not want to talk. Then, he and Jack walked up a hill. Mouse then asked why Jack would kill somebody over a women. This arguably is the first violation of Miranda because Muppet could argue that Mouse did not scrupolously honor Jacks's Miranda right because he instantly reinstituted quesiton without even reading the rights to him again. Thus, one might argue that Jack's comment to Mouse that "this goes back a lot further than what you understand." was not a waiver of his miranda right because it was not voluntary because Mouse kept bothering in Jack in violation of his Mirdanda rights.

The next violation occured when Duck interrogated Jack in the patrol vehicle. During this interrogation, Duck did not read Jack his Miranda rights again. Thus, he did not scrupolously honor Jack's right to remain silent. Furthermore, it appears that Jack invoked his right to an attorney. The United States supreme Court has stated that a defendant must unequivocally invoke his right to counsel. Thus, the state may argue that " I would like an attorney" is merely a desire, a hope or a prayer. Ms. Mupphet will argue that Jack affrimatively invoked his right; therefore, Duck should have ended all question including stating "do you want to go to jail or talk." which he knew would elicite a response. Thus, Jack's confession will most likely be excluded under Miranda.

As a note, Jack might also have his confession excluded udner the fourteenth amendment involuntariness test. Muppet would argue that then increased pressure by the police, the repeated questioning by the cops, and the ignoring of his Miranda right led Jack to confess. This argumetn however probably would not work becaue most case that exclude confessions as involuntary take place over a number of days and are more extereme than this. Furthermore, lies by the police such as, "talk or you will go to jail." have been held not to violate the 14th amendment.

APPLICANT NO._____

ARKANSAS STATE BAR EXAMINATION
FEBRUARY, 2009

TORTS
2 pages

Bob White celebrated his 18th birthday today, Saturday, January 10, 2008. His parents had long awaited this day. They were financially unable to provide Bob a car of his own on his 16th birthday as they had hoped. Today, however, they surprised Bob with a framed Certificate of Title to his own environmentally friendly 2008 Chevrolet Tahoe, equipped with a Flex Fuel 4-cylinder engine and an automatic transmission. Bob was overjoyed with this wonderful and generous gift.

The car was also, in a manner, a reward to Bob for his past safe driving record with no history of speeding or other traffic violations. Bob was well behaved and a regular volunteer at neighborhood and community events and activities. He acted as a "big brother" to many of the neighborhood children in playing ball, riding bikes and joining in games like hide-and-seek. These were regular activities in his historic neighborhood along Easy Street. With sidewalks, on-street parking and lined with giant maple trees, Easy Street coursed through the kind of neighborhood desired by most families.

Naturally, Bob struck out on his first adventure driving his brand new Tahoe. Leaving the birthday party early, Bob proudly drove down Easy Street to the shouts of joy of his neighbors and their children who ran down the sidewalks on both sides of Easy Street waiving and squealing as young kids so often do. Bob, driving the speed limit of 35 mph, looked side to side waving and laughing along with the neighbors and the children. This glorious moment ended in tragedy when 5 year old Robin Bird darted from the sidewalk, between two of the many cars parked along Easy Street, and was struck by the Tahoe. She sustained catastrophic injuries that would leave her with life-long disabilities.

Although heartbroken at the thought of bringing suit against Bob White and his parents, Big Bob and Rosie White, Robin's parents hired a lawyer and a suit was filed on behalf of Robin and her parents. The Complaint contained counts against Bob and his parents. The suit alleged that Bob operated the car in a negligent manner. It was also alleged that Big Bob and Rosie were liable as his parents and because they provided the car to Bob.

Question 1. Applying Arkansas law, in your opinion did Bob operate the Tahoe in a negligent manner...yes or no? Explain the rationale of your opinion.

Question 2. Applying Arkansas law, in your opinion is there a reasonable and lawful basis for finding that Big Bob and Rosie White are liable for any fault of their son, Bob, because of their own actions or because they are Bob's parents...yes or no? Explain the rationale of your opinion.

TORTS - BEST ANSWER
4 pages

1.) **Did Bob operate the Tahoe in a negligent manner?**

Under Arkansas tort law, a successful action for negligence must be comprised of the following: a duty, a breach of that duty, causation (both actual causation and proximate causation, and damages. To determine whether Bob operated the Tahoe negligently we should take each element in turn.

First, did Bob owe a duty to Robin? In Arkansas, a person has a duty to act as a reasonably prudent person under similar circumstances and that duty extends to all forseeable plaintiffs. Following Judge Cardozo's "zone of danger" test in *Palsgraf* it is readily apparent that Bob owed Robin a reasonabe duty of care. It should also be noted that since Bob was 18, he owed Robin the reasonable duty of care of an adult, not a child of like age, experience, etc. (Although, even if Bob were a child the adult standard of reasonable care would apply since Bob was operating a vehice and, thus, engaging in adult like activities. Because the streets were lined with people cheering and waving to Bob, these persons, including Robin, were all foreseeable plaintiffs and Bob owed them a duty of reasonable care. While one might not expect a small child to dart from between cars and into the road, this is a forseeable event and as such, Bob should have taken care to pay closer attention to the road under in this instance to ensure that he would be able to stop if a child did dart out.

Second, in order for Bob to be liable to Robin he must have breached that duty of care owed to her. Under the facts this is a difficult call, however, Bob most likely did breach his duty of care to Robin. The facts of Bob and his past lead the reader down the initial thought path

that Bob was not negligent. After all, Bob had such an admirable past and safety record and, in fact, was traveling the speed limit when the accident occurred. Unfortunately for Bob, his past is of no consequence in determining his liability to Robin and her parents, nor is his stellar record of community involvement. As for his traveling within the speed limit, an argument can certainly be made that this is evidence of non-negligence, however, traveling within the speed limit does not, in and of itself, preclude a finding of negligence against Bob. The facts tell us that Bob was looking from side to side and waving to the crowd and laugh. In a negligence suit on behalf of Robin, such inattentive behavior to the road by Bob would most likely translate into a finding of negligence, at least to some degree. Arkansas is a modified comparative negligence state and has enacted a statute entitling a plaintiff to recover so long as they are less than 50% at fault. Under this facts, any recovery on behalf of Robin would need to be offset by any comparative fault of her own. Therefore, because Robin is likely less than 50% at fault for this accident, recovery against Bob is, in at least some degree, likely.

Third, for Bob to be negligent, the accident must have been the actual cause of Robin's injuries. Here, but for Bob's negligent inattention to the road while driving Robin would not have been hit. As an aside, these elemental questions of negligence would be questions of fact for a jury to decide. A jury might very well find that Bob breached no duty of care and was not negligent; however, as the question prompts in my opinion Bob was likely negligent to at least some degree. Actual cause is typically easier to prove than proximate cause, since proximate cause is a more lofty concept. Here, however, it is my opinion that Bob's negligent driving was the proximate cause of Robin's injuries, since it is forseeable that when someone drives negligently down the street that person might cause the type of harm inflicted upon Robin (again, this is a different concept than whether Robin was a forseeable plaintiff). Here, as there were no intervening and superseding causes of Robin's injuries, the accident is likely to be

deemed the proximate cause of Robin's injuries.

Lastly, there must be damages in order for Robin's suit against Bob to be successful. Here there is no question that damages exist. Robin suffered catostrophic injuries that have left her with life- long injuries. Since the question doesn't specifically ask for a detailed analysis of the particular damages available to Robin, in the interest of brevity, I will only note that Robin was five years old and had life long disabilities. This leads to the probable result that if negligence is found, which I believe it will be, Robin may recover for past and present medical bills, pain and sufferining, loss of enjoyment of life, lost future earnings. It should be noted that any award of future damages must be discounted to present value.

In the end, it is likely that Robin can prove all of the requisite elements to sustain an action for negligence against Bob. Bob will likely be liable to Robin as a result.

2.) Under these facts, there is no viable action for negligence, negligent entrustment or vicarious liability against Big Bob and Rosie. While Arkansas does hold parents vicariously liable for the negligent acts of their children in driving, if they sign the minor's signature, this is not the case if the child wasn't a minor. Here, Bob turned 18 on the day of the accident and therefore will most likely be considered an adult and no longer a minor. However, if I were Robin's attorney, I would check to see at what time of the day Bob was actually born in order to determine whether Bob was lawfully 18 years old. I would have to research this legal question further to decide whether the law would strictly adhere to the actual time of his birth in determining whether Bob was an adult. For instance, if Bob was born at 11:59 pm on Jan. 10th, 1990, then Bob might techinically still be considered a minor. If a court found this to be the case, Bob's parents could, under Arkansas law, be held vicarious liable for Bob's negligent

driving, if one or both of them signed his driver's license. This is not the likely outcome, however, and the parents are not likely to be found liable for vicarious liability.

Nor are Bob's parents likely to be liable for negligent entrustment. While Bob's excellent track record has no bearing on his own neligence In this case, it certainly carries weight when determining whether Bob's parents were negligent in entrusting Bob with the Tahoe. If they were, then Robin's suit could be against the parents under a theory of negligent entrustment. However, as the facts make clear Bob was given the Tahoe as a reward for his past safe driving record and he had no history of speeding or other traffic violations. Bob was well behaved and civically involved in the community (likely to be deemed an indication of maturity). All in all, under Arkansas law, there is not a reasonable and lawful basis for finding that Big Bob and Rosie are liable for any fault of Bob, because of their own actions or because they are Bob's parents.

END OF EXAM

APPLICANT NO._____
ARKANSAS STATE BAR EXAMINATION
FEBRUARY, 2009

Wills, Estates & Trusts
1 page

In 2004, Mae was a widow, the mother of three living children, each of whom had one child. A fourth child had died leaving Mae a grandchild, George. Mae owned a 240 acre farm. In 2002, Mae had granted one of her children, Dottie, a broad durable power of attorney. Dottie, as the attorney in fact, or agent, had the authority to execute and deliver deeds to all or part of Mae's property. Dottie had been Mae's primary care-giver for many years and had assisted her in bill paying and many other ways.

In 2005, Mae made a valid will. The will named her three children as beneficiaries and in particular left the farm to her "children in equal shares." No mention was made of George or any other descendants. Dottie was nominated in the will as Executor.

In 2006, Mae became totally incapacitated, unable to write, speak, think or act of her own volition. When her mother became incapacitated, Dottie continued taking care of Mae and her affairs using the power of attorney.

In 2007, knowing of the provisions of Mae's will and the decline in available cash for her mother's care, Dottie hired a surveyor and selected 80 acres to be carved out of the farm. Dottie then signed and recorded a deed, using the power of attorney, to a revocable trust of which Dottie was the sole Grantor, Trustee and beneficiary. Dottie had the 80 acres appraised. It was worth $80,000.00. Using her own funds, Dottie paid the amount to a bank account jointly owned by Mae and Dottie, payable on death to the survivor. At the time Mae was gravely ill. Mae died one week after the land transaction, leaving the $80,000.00 in the joint account. The rest of the land, 160 acres, was appraised for $180,000.00.

Dottie petitioned the court to admit the will to probate and appoint her as Executor. Her siblings objected.

At the hearing on the appointment of Dottie, all the facts set out above were presented to the Judge.

Questions:

A. Should the court appoint Dottie as Executor? Explain your answer fully.

B. Once an Executor is appointed, what actions should be taken in regard to the real estate transaction? State the legal basis for those actions being taken.

C. Are Dottie and siblings the only persons who are entitled to share in Mae's estate? Please explain your answer.

WILLS, ESTATES & TRUSTS - BEST ANSWER
1 page

1.

Dottie should not be appointed as Executor of her mothers estate. An executor of an estate should be a person who will execute the estate in a trustworthy, lawful manner, following the directives of the will and without prejudice to all the heirs/beneficiaries. The executor has a duty of care to the estate. Dottie has already shown she could not be trusted. She abused her power as power of attorney in going against the wishes of her mother - "children in equal shares" - and segregating a portion of the farm and reserving the proceeds in a trust in which she was the sole grantor, trustee and beneficiary. This gives the appearance that Dottie is planning to take that 80 acres in addition to her portion of the remaining 160 acres. Dottie should have set up the trust naming all of the heirs as beneficiaries and/or had all the land appraised and only placed a portion, agreed upon by potential heirs, in the trust or better yet sold small portions of the land with consent of others and used those proceeds to care for her mother with residue to the heirs. It appears Dottie is attempting to "sweeten the pot" for herself and should not be named as executor, a position which should be executed with due care, honesty and faithfulness.

2.

Once an executor is appointed the real estate transaction will need to be examined. Even though Dottie placed her own money in the trust, she constructed the trust as benefit only for herself. A trust in which one person is the sole grantor, trustee and beneficiary will be found to be invalid in light of any potential misrepresentation, fraudulent behavior or attempts to deceive. If the trust is allowed to stand, Dottie would retain her own $80K in addition to the $80K from the 80 acres and her portion of the 160 remaining acres. The court should revoke this self serving trust, give Dottie back her $80K and transfer the property from the trust back to the estate. The court could require the trust to sell the deeded 80 acres and then divide the proceeds equitably between the heirs. As Mae wanted the farm to go to the children, the trust should deed it to the estate.

3.

Mae's will was valid. She named her three children as beneficiaries to take in equal shares. This is called per capita - those in the same generation take equally if intestate. Mae also had a grandchild from a deceased fourth child. Since George was not specifically named in the will and Mae did not specifically leave him out e.g.: "George gets nothing", he will be able to take his intestate share. If Mae had died intestate George would receive the share of his deceased parent. This share would be per stirpes, meaning he would take the parents interest after divided between any other children of the deceased. Here George is the only child. George would therefore take the whole share his parent would be entitled to. George will take a 1/4th interest in the farm which is the portion his parent would have received if living. All 240 acres will be divided equally between the three remaining children and George as his parent (the deceased child's) heir.

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ARKANSAS STATE BAR EXAMINATION
FEBRUARY, 2009

Equity & Domestic Relations
2 pages

John and Marsha have been married seven years and have lived in Arkansas for three months. They have two children. Marsha was pregnant with a third child when they completed their move to Arkansas. All of their property including cash, stocks, bonuses, retirement, and the new home they bought in Arkansas, came from income earned by both parties while working as doctors. The one exception is a medical supply business that has existed in Arkansas for many years and which John inherited from his father five years ago. John's ownership is represented by 100% of the shares of stock. Although the business generally operates on its own, John has spent a good deal of time in recent years in Arkansas helping to promote the growth and value of this corporate medical supply business. The amount of time John has spent at the business is one of the main reasons the couple decided to move to Arkansas.

Marsha did not continue to practice medicine after she became pregnant. She became a full time child care giver.

Marsha gave birth to the third child, who appears ethnically different from both John and Marsha. John became upset and believed that Marsha committed adultery and had humiliated him to their family and friends. He proceeds to express his feelings about Marsha to all that would listen, even in the presence of Marsha. John filed for a divorce. Marsha was humiliated that John accused her of adultery and stated this accusation in front of family and friends. Marsha knows she has been faithful to John at all times.

After John files for divorce, Marsha's attorney counter-claims and gets the Court to order DNA testing.

Question 1

To obtain a divorce in Arkansas, discuss the following:

A. What is the residence required in Arkansas at the time of commencement of the action and the residence requirement before the final judgment?

B. Which parties' residence is required to be proven?

C. How long does a complaint for divorce have to be on file before a decree of divorce can be granted?

D. State what witnesses are required to prove residence and whether the residence proof can be waived if the divorce is uncontested.

E. Does the Residence proof always have to be by oral testimony or can it be verified with an affidavit? If it can, state in what circumstance proof can be by verified affidavit.

Question 2

Discuss the following regarding grounds for divorce:

A. When is it not necessary or required to have corroboration of Plaintiff's grounds for divorce?

B. Assume the DNA test had shown the child was not John's. Would he be able to prove adultery?

C. Would Marsha be entitled to a divorce on grounds of general indignities if the DNA test did show that it was John's child?

Question 3

Assume Marsha is granted a divorce in Arkansas. Discuss the division of property in the following two areas of assets:

A. On what basis or theory under Arkansas law might Marsha be entitled to any of the medical supply company inherited by John?

B. What is the proper distribution of all the marital property under Arkansas law? Please discuss whether the following facts regarding Marsha and John would be appropriate for the Court to consider in the division of their marital property: (1) occupation of the parties; (2) sources of income available to each; (3) length of marriage; and, (4) contribution of each party in acquisition, preservation, or appreciation of marital property, including service as a homemaker. Indicate what the Court must do to use these factors in the division of the marital assets.

Question 4

Assume that Marsha and John got a divorce and the children are in the joint custody of Marsha and John. Also, assume that the children are doing well and they are generally unaffected by the continued turbulent behavior of their parents towards each other. Marsha wants custody changed. The specific facts and conduct she produced to the court for change of custody are: (1) John stomping around and ranting and raving about missing coats following an exchange of custody; (2) disagreement about two bags of laundry the children brought home from a ski trip as to whether the clothes were clean or dirty; (3) appropriateness of John attending a Super Bowl party with the children in tow; (4) conduct by John involving a heated discussion with one of the children's baseball coaches; and, (5) use of a braying donkey to identify Marsha's phone calls which the children have overheard. According to the children's counselor and attorney ad litem, the children seem unscathed by their parents conduct and even seem to be amused by the behavior of their parents.

A. Discuss the Arkansas standard for the Court to enter a change of custody order.

B. Would this conduct allow a change of custody under Arkansas law?

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1)
a) At least one of the parties must be a resident/domiciled in Arkansas for 60 days before filing for divorce. In the instant case John and Marsha both meet this as they have been in Arkansas, living and working, for 90 days.
b) Either party's residence can be proven.
c) A complaint for divorce must be on file for 30 days before a divorce will be granted.
d) You must have corroborating witnesses to prove residence and residence proof cannot be waived just because the divorce is uncontested.
e) In an uncontested divorce, residence can be verified with an affidavit. Otherwise, oral testimony is the standard for a contested divorce.

2)
a) It is not necessary to have corroboration for the grounds when the divorce is uncontested.

b) John will be able to prove adultery. Adultery can be shown by propensity to commit adultery and by opportunity. Additional scientific tests such as blood, DNA, etc. can be used to establish paternity. John and Marsha were married for 7 years and John will have rebutted the presumption, that a child born to a couple during marriage is the husband's child, with the DNA test. The only logical conclusion in a 7 year marriage is that the child is not his.

c) Marsha would be entitled to a divorce on the grounds of general indignities if the DNA test had established John's paternity. General indignities requires a systematic and repeated humiliating, demeaning and intolerable treatment. John's actions are certainly wrongful and inappropriate, they occur over a short period of time, but are aimed directly at family and friends and openly accuse her of unfaithfulness and unchastity to third parties.

3)
a) Marsha might be entitled to some value from the medical supply company based upon her contributions to it. Property acquired by one party during the marriage is presumed to be marital property. An exception for this exists when the property is a gift to one spouse from his own family via inheritance. As stated in the facts, John received an already existing business from his father. The value present at the time of inheritance will belong to John. However, if the business has been worked jointly, or if Marsha substantially contributed to the business, then she will likely get the value of her contribution considered when dividing up assets. This is also a close corporation, so it is likely she will not get shares, but rather some other offsetting thing of values such as money or property.

3)
b) The proper basis for marital distribution under Arkansas law is that the Court gives each party their separate property (what they owned prior to marriage, plus gifts from their own family, inheritance) then the Court divides the marital property 50/50, subject to the discretion of the Court to adjust if equity requires. The Court must weigh many factors when attempting an equitable distribution of the property. The occupation of the parties weighs on future income, and will likely be more appropriate when looking at alimony, but it could be considered. Sources of income available to each might affect an equitable division of assets, but is more appropriate to alimony, than an equitable distribution of property. Length of the marriage will weigh on how much was contributed by each party, but remember that division of assets is not punitive or rewarding to either party for the time married. Contribution of either party in the acquisition of assets is wholly appropriate in determining a fair and equitable distribution. In the instant case, both are/were practicing doctors, but be aware that Marsha's employment as a homemaker will not diminish her contribution to the assets. The Court must balance the factors in determining the distribution.

4)
a) There are two standards used for the Court to enter a change of custody order. The first is the "best interests of the child" and the second is a "material change in circumstances". The best interests of the child takes in to account the reasonable preferences of the child, harm to family relationships, educational opportunities, bad or illegal behavior of either parent, sexual relations of either parent and a host of other factors. A material change in circumstances might be shown where a parent given custody now appears unfit, as where they have abused the child, neglected the child or harmed the children.

b) this conduct, although not appropriate, would probably not be egregious enough to warrant a change in custody. The first two items, involving laundry and missing coats, are likely the types of common disagreements between divorced parents. The next two items, involving both the Super Bowl Party and conduct at a ball game regarding a coach, needs more detail. We would need to know what type of conduct happened at the ball game. Did John assault or batter the coach in front of his kids, or was he just being a little league dad? At the Super Bowl party, was there excessive drinking and swearing? Regarding the use of a braying donkey for phone rings, this probably is not in the best interests of the child, but I do not know that it is egregious enough to change custody. What the Court will do is look at all of the behavior, taken as a whole, and determine whether it is in the best interests of the child or amounts to a material change of circumstances.